No. 95-717

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS MAHALEK,

Petitioner,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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50P?

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Are nonpecuniary damages for loss of society recoverable by a nondependent sibling of a decedent, for a death occurring on the high seas, within the meaning of DOHSA[1], during the course of international air transportation, within the meaning of the Warsaw Convention[2]?

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[1] Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention").

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Petitioner

The Petitioner is Thomas Mahalek, who was the plaintiff-appellant in the Court of Appeals.

B. Respondent

The Respondent is KOREAN AIR LINES CO., LTD. ("KAL") who was the defendant-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.

Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

No opinion of the Court of Appeals has been issued, as the Petitioner filed the Petition for Writ of Certiorari prior to the submission of any briefs to the Court of Appeals. The opinion of the district court is not officially reported and is reproduced in the Appendix to the Petition for Writ of Certiorari at A2-5.[1] The other relevant opinions and orders of the district court and Court of Appeals are reproduced at RA1a-2a, 5a-6a, 7a-8a, 11a-12a, 13a-14a, 17a-18a.[2]

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[1] References preceded by "A" refer to pages in the Appendix to the Petition.

[2] References preceded by "RA" refer to pages in the Appendix hereto.

JURISDICTION

The amended final judgment on the jury verdict was entered on March 9, 1995. RA11a-12a. Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on March 24, 1995. RA9a-10a. On August 9, 1995, at the invitation of the Court of Appeals, Petitioner filed a motion to voluntarily dismiss the appeal, without prejudice to reinstatement upon the Court's disposition of *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689 (1995) (Nos. 94-1361, 94-1477). RA3a-4a. The Court of Appeals granted Petitioner's motion and dismissed the appeal. RA1a-2a. The Order of Dismissal and Mandate to the district court were filed on September 5, 1995. RA1a-2a. The Petition for Writ of Certiorari was docketed on November 3, 1995. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. §§ 1254(1), 2101(e).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statutes are the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* ("DOHSA") and 28 U.S.C. § 1254(1). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the text herein or in the Appendix hereto at RA22a-23a.

STATEMENT OF THE CASE

A. Nature of the Case and Governing Law

Petitioner, Thomas Mahalek, is the adult brother of MURIEL KOLE (hereinafter the "decedent"), a passenger killed on KAL flight KE007, which was shot down by Soviet military aircraft on September 1, 1983. Petitioner commenced this wrongful death action against KAL individually and in his personal capacity to recover wrongful death damages for the death of his sister. *Mahalek v. Korean Air Lines*, No. 83-4381 (N.D. Cal.). Petitioner is not the personal representative of the estate of his sister.

The action is governed by DOHSA and the Warsaw Convention, as supplemented by the Montreal Agreement.[3] Although the Warsaw Convention has been held to create a wrongful death action for passengers killed during "international transportation by air,"[4] the Convention does not set forth who may maintain an action, the types of recoverable compensatory damages or the proper claimants in the event of the death of a passenger. These issues were left intentionally by the drafters of the Convention for determination by the internal damage laws of each contracting party to the Convention. *See Alcabasa v. Korean Air Lines*, 62 F.3d 404 (D.C. Cir. 1995); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air I*"); *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1283 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987).

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[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302).

[4] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

DOHSA is the internal law of the United States which is applicable to all deaths occurring on the high seas and sets forth the proper person with standing to maintain an action, the types of recoverable compensatory damages and the proper persons for whose benefit the action must be brought. 46 U.S.C. App. §§ 761, 762 (RA23a); *see Alcabasa*, 62 F.3d at 406-08. It is undisputed that the death of decedent occurred on the high seas within the statutory scope and meaning of DOHSA. 46 U.S.C. App. §§ 761, 762 (RA23a). DOHSA specifically allows only the personal representative of a decedent to maintain a death action, restricts recoverable damages to pecuniary losses only and does not permit the recovery of nonpecuniary damages for loss of society. *See* 46 U.S.C. App. §§ 761, 762 (RA23a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

B. Disposition Below

1. The Damage Trial in the District Court

Prior to trial in the district court on the issue of recoverable compensatory damages,[5] KAL moved to dismiss the action commenced by Petitioner on the ground that, pursuant to § 761 of DOHSA, Petitioner lacked the capacity to maintain the action because he was not the "personal representative" of the estate of the decedent.[6] KAL also moved, *inter alia*, for a determination that DOHSA, as the federal law directly appli-

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[5] The liability of KAL was determined in the context of the multidistrict litigation proceedings before Judge Aubrey Robinson, Jr. in the United States Court of Appeals for the District of Columbia. *See Korean Air I*, 932 F.2d at 1476-79.

[6] The duly appointed personal representative had brought a wrongful death action against KAL in the United States District Court for the Southern District of New York which is currently pending before the Court. *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689 (1995) (Nos. 94-1361, 94-1477), *granting cert. to*, 43 F.3d 18 (2d Cir. 1994) (oral argument heard Nov. 7, 1995).

cable to all deaths occurring on the high seas, prescribes the recoverable damages in this case, and prohibits the recovery of nonpecuniary damages for loss of society and survivor's grief. The district court denied KAL's motions and held that Petitioner was entitled to maintain the action in his individual capacity and, further, was entitled to recover nonpecuniary damages for loss of society and survivor's grief. RA17a-18a, 19a-21a.

A jury trial on the issues of compensatory damages was held in October, 1993. The jury awarded Petitioner $75,000 for loss of society damages and made no award for survivor's grief. RA13a-14a. Following the jury trial, KAL moved, pursuant to Fed. R. Civ. P. 50(b), for judgment as a matter of law on the grounds that DOHSA does not allow recovery of nonpecuniary damages for a death on the high seas and, alternatively, that Petitioner was not financially dependent on the decedent at the time of her death and, therefore, was precluded from recovering loss of society damages. Because Petitioner admitted at trial that he was not financially dependent upon the decedent (RA16a), the district court, relying on the Second Circuit's decision in *Zicherman v. Korean Air Lines*, 43 F.3d 18 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995), granted KAL's motion for judgment as a matter of law and set aside the damage award for loss of society. A2-5.[7]

2. The Appeal to the Court of Appeals

Petitioner appealed the judgment of the district court. *Mahalek v. Korean Air Lines*, No. 95-15559 (9th Cir. appeal filed Mar. 24, 1995). Because KAL was the prevailing party in the district court and the sole damage award was set aside, KAL did not cross-appeal the district court's pre-trial ruling that Petitioner had standing to maintain an action separate from that of the personal representative. *See Turgen v. City of Corvallis*, 6 F.3d 978, 980 (9th Cir.), *cert. denied*, 115 S. Ct.

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[7] In *Zicherman*, 43 F.3d at 21-22, the Second Circuit held that loss of society damages are recoverable but only by dependent relatives.

426 (1994); *see also United States v. Raines*, 362 U.S. 17, 27 n.7 (1960).

Petitioner's opening brief in the Court of Appeals was due on July 14, 1995. RA7a-8a. Petitioner did not meet the filing date and requested a 14-day extension to July 27, 1995. The Court of Appeals granted the requested extension. On July 27, 1995, Petitioner filed a motion for a second extension of time and advised the Court of Appeals that he had filed a Petition for Writ of Certiorari with the Court on July 25, 1995. The Court of Appeals denied Petitioner's motion for a second extension of time. RA5a-6a. The Court of Appeals, however, ordered that:

> within 14 days from the date of this order, appellant [Petitioner] shall move for voluntary dismissal of his appeal without prejudice to reinstatement upon disposition of the U.S. Supreme Court case [*Zicherman*]. Alternatively, appellant [Petitioner] shall show cause, in writing, how he may be prejudiced by such a dismissal.

RA5a-6a.

Petitioner opted to request a voluntary dismissal of the appeal. RA3a-4a. The request for voluntary dismissal was filed on August 9, 1995 and subsequently was granted by the Court of Appeals by Order filed September 5, 1995. RA1a-2a.

Petitioner's initial Petition for Writ of Certiorari filed on July 25, 1995 was rejected by the Clerk of the Court. Petitioner thereafter filed this second Petition which was docketed on November 3, 1995.

REASONS FOR DENYING THIS WRIT

I

THE COURT LACKS JURISDICTION TO CONSIDER THE PETITION AS IT IS PREMATURE

Petitioner seeks a writ of certiorari before judgment in the Court of Appeals for the Ninth Circuit. Pursuant to 28 U.S.C § 1254(1), a petition for a writ of certiorari may be filed with the Court before judgment by a Court of Appeals.[8] The primary requisite to the exercise of the Court's power to grant certiorari before rendition of judgment by the Court of Appeals is that the case is "pending in" the Court of Appeals. *See Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982); *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1303 (1976); *United States v. Nixon*, 418 U.S. 683, 690-92 (1974). The Court has explained "that the sole essential of [the] Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." *Gay v. Ruff*, 292 U.S. 25, 30 (1934) (citing *Forsyth v. City of Hammond*, 166 U.S. 506, 512 (1897)).

The Court lacks jurisdiction over the Petition because there is no case "pending in" the Court of Appeals. Petitioner moved to voluntarily dismiss the appeal on August 9, 1995 at the invitation of the Court of Appeals. RA3a-4a. The Court of Appeals granted Petitioner's motion to dismiss the appeal and issued an order and mandate to the district court on September 5, 1995. RA1a-2a. The Petition for Writ of Certiorari was not docketed until November 3, 1995. Since there is no case

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[8] Section 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1254(1).

"pending in" the Court of Appeals, jurisdiction does not exist under 28 U.S.C. § 1254(1). For this reason, the Petition should be denied.

II

CERTIORARI BEFORE JUDGMENT ALSO SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED IS NOT OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE

Even if the case can be considered to be pending in the Court of Appeals within the meaning of 28 U.S.C. § 1254(1), a Petition before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

Petitioner argues that review is justified at this time because (1) the *Zicherman* case which is pending before the Court involves the same issue presented by the Petition herein, and (2) the decision of the district court to set aside the damage award to Petitioner, the nondependent sibling of the decedent, is in conflict with *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994). Neither argument supports the position that this case is "of such imperative public importance" so as to justify departure from the usual appellate review process.

A. The Pendency of *Zicherman* Does Not Warrant Certiorari in this Case

Petitioner argues that the Court should grant the Petition because the Court granted certiorari in *Zicherman*. The mere fact that a case is pending in the Court involving a similar issue, without more, does not justify departure from the usual appellate review process.

In support of his argument, Petitioner relies on *Taylor v. McElroy*, 358 U.S. 918 (1958) and *Porter v. Dicken*, 328 U.S. 252 (1946), where the Court granted certiorari on the basis that the Court had granted certiorari in a companion case. Those cases are inapposite to the Petitioner's case. While in *Taylor* and *Porter* the question raised by the petitions involved the same issue as cases already before the Court, unlike *Taylor* and *Porter* there is a threshold issue in this case of Petitioner's standing to maintain this wrongful death action in his individual capacity, apart from the action by the personal representative. Resolution of this issue in favor of KAL by the Court of Appeals, if the appeal is reinstated by Petitioner following the decision in *Zicherman*, will render this Petition moot. *See infra.* at 11. Moreover, the Court granted certiorari in *Taylor* and *Porter* before oral argument of the cases already pending before the Court. Here, however, *Zicherman* has been heard by the Court and the concerns that the Court was faced with in *Taylor* and *Porter* do not exist in this case. Moreover, if *Zicherman* results in a decision denying recovery of loss of society damages in these cases, there would be no basis to reinstate the appeal in the Court of Appeals.

B. The District Court's Decision that Nonpecuniary Damages for Loss Of Society Are Recoverable Only by Financially Dependent Siblings Is Not in Conflict with the Decision of Any United States Court of Appeals

Petitioner is correct that the issue whether nondependent relatives may recover loss of society damages currently is pending before the Court in *Zicherman*. Petitioner is incorrect, however, when he argues that the decision of the district court conflicts with *any* Court of Appeals decision.[9] The dis-

[9] The only portion of the district court decision that *is* contrary to federal and general maritime law, is the district court's initial holding that Petitioner had standing to maintain this action and that loss of society damages are recoverable at all for a death on the high seas. *Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-25; *see infra.* at 11-13. The latter issue currently is pending before the Court in *Zicherman*.

trict court's decision that damages for loss of society are not recoverable by a nondependent *sibling* is consistent with well settled authority that the threshold requirement for the recovery by a sibling of *any* pecuniary damages under DOHSA,[10] *or* pecuniary/nonpecuniary damages under general maritime law, is that the sibling be financially dependent upon the decedent at the time of death. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1090 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Miles v. Melrose*, 882 F.2d 976, 988-89 (5th Cir. 1989), *aff'd sub nom. on other grounds, Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1350 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985); *see also In re ABC Charters, Inc.*, 558 F. Supp 364, 366 (W.D. Wash. 1983).

The only decision Petitioner relies upon to establish the purported conflict is *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), which involved wrongful death actions by nondependent *parents* of decedents killed in the territorial waters of the United States. The court in *Sutton* held that dependency is not relevant to the recovery of loss of society damages by a *parent* under general maritime law and allowed nondependent parents of the decedents to recover loss of society damages. 26 F.3d at 916-17. The decision did not address and left undisturbed the rule that siblings must establish dependency in order to recover.

The decision of the district court is consistent with DOHSA and general maritime law, which require a showing of financial dependency for a sibling to recover *any* damages, pecuniary or nonpecuniary. Thus, there is no need for the Court to review this aspect of the decision of the district court.

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[10] The schedule of beneficiaries in DOHSA limits the beneficiaries to the "decedent's wife, husband, parent, child or *dependent relative*." 46 U.S.C. App. § 761 (emphasis added) (RA23a).

III

THE PETITION FAILS TO RAISE A QUESTION THAT JUSTIFIES REVIEW BECAUSE PETITIONER LACKS STANDING TO MAINTAIN THIS ACTION

Even if the Court in *Zicherman* concludes that loss of society damages are recoverable, and allows a financially non-dependent sibling to recover such damages, the district court's decision to set aside the damage award for loss of society is correct, albeit on other grounds not presently before the Court of Appeals.

Petitioner brought a separate wrongful death action in his individual capacity, apart from the action that was instituted by the personal representative of decedent's estate in New York. The district court, in denying KAL's motion to dismiss the action for lack of standing, held that Petitioner could maintain the action in his individual capacity because the Convention contains no limitation as to standing. RA17a-18a, 19a-21a. This decision of the district court is incorrect and contrary to the well established rule under DOHSA and general maritime law that only the personal representative of the estate has standing to maintain a wrongful death action. Thus, the issue of standing is a threshold issue that must be addressed and resolved by the Court of Appeals, in the event the appeal is reinstated following the decision in *Zicherman*, before the question of recoverable damages is reached.

It is undisputed that this action is governed by the Warsaw Convention. The Convention does not address who may maintain the cause of action for wrongful death. Pursuant to Article 24(2) of the Convention, the question of standing to maintain an action under the Convention was intentionally left to be governed by the internal law of the parties to the Convention. *Alcabasa*, 62 F.3d at 406-08; *Korean Air I*, 932 F.2d at 1485; *Mexico City*, 708 F.2d at 415. As the death of

the decedent occurred on the high seas, the directly applicable federal statute is DOHSA. *Alcabasa*, 62 F.3d at 406-08.

Under § 761 of DOHSA, the only proper party plaintiff that has standing to maintain a death action involving a death on the high seas is "the *personal representative* of the decedent." 46 U.S.C. § 761 (emphasis added) (RA23a); *see* 46 U.S.C. App. § 762 (RA23a); *Alcabasa*, 62 F.3d at 406-08; *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 494-95 (2d Cir. 1958); *Cruz v. Korean Air Lines*, 838 F. Supp. 843, 846-847 (S.D.N.Y. 1993); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 478-79 (N.D. Cal. 1987).[11] Where the law providing the basis for a cause of action for wrongful death requires that the lawsuit be filed by the personal representative, a separate action brought by a potential beneficiary must be dismissed. *Alcabasa*, 62 F.3d at 408; *Tidewater Marine Towing, Inc. v. Dow Chemical Co.*, 689 F.2d 1251, 1253 (5th Cir. 1982); *Futch*, 471 F.2d at 1196; *Williams v. Louisville & Nashville R.R. Co.*, 371 F.2d 125, 127-28 (6th Cir.), *cert. denied*, 388 U.S. 919 (1967); *Nejad v. United States*, 724 F. Supp. 753, 756 (C.D. Cal. 1989); *Favaloro*, 687 F. Supp. at 478-79; *see also Cruz*, 838 F. Supp. at 846-48.[12]

In this case, the only proper action for the death of the decedent was by the personal representative of decedent, Marjorie Zicherman, the plaintiff in the New York action. Marjorie Zicherman, Petitioner's sister, had the sole and absolute

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[11] Similarly, the Jones Act, 46 U.S.C. App. § 688, Federal Employers' Liability Act, 45 U.S.C. App. § 59, and general maritime law, allow only the duly appointed personal representative of the decedent's estate to maintain an action for the benefit of the estate and any beneficiaries. *Calton v. Zapata Lexington*, 811 F.2d 919, 921 (5th Cir. 1987); *Futch v. Midland Enter., Inc.*, 471 F.2d 1195, 1196 (5th Cir. 1973); *Southern Pacific Co. v. Heavingham*, 236 F.2d 406, 408 (9th Cir. 1956).

[12] *But see In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073 (S.D.N.Y. 1992) (holding that Warsaw Convention allows individuals other than personal representative to file suit). The rationale of this decision was expressly rejected in *Alcabasa*, 62 F.3d at 406 and *Cruz*, 838 F. Supp. at 846 n.2.

authority to litigate the wrongful death and survival action on behalf of the estate and all proper beneficiaries. Petitioner simply does not have standing to maintain a separate action in his individual capacity.

While the district court properly set aside the sole damage award in this case, the district court should have dismissed the entire action for lack of standing. Petitioner appealed the district court's decision to set aside the sole damage award by the jury. KAL, however, lacked standing to file a cross-appeal because KAL had successfully obtained a dismissal of the entire claim. *Turgen*, 26 F.3d at 980; *see Raines*, 362 U.S. at 27 n.7 (no cross-appeal necessary if the party received the relief it requested). On any reinstated appeal to the Court of Appeals, KAL will argue that the dismissal was proper on the alternative ground that Petitioner lacked standing.

No reason is presented for circumvention of the normal appellate procedure and the granting of certiorari at this time. Even if the Court in *Zicherman* concludes loss of society damages are recoverable, Petitioner still would not be entitled to any damages because Petitioner lacks standing to maintain this action.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Dated: December 1, 1995

Respectfully submitted,

TOMPKINS, HARAKAS, ELSASSER & TOMPKINS

Andrew J. Harakas*
George N. Tompkins, III

Courthouse Square
140 Grand Street
White Plains, New York 10601
(914) 428-2525

Attorneys for Respondent
KOREAN AIR LINES CO., LTD.

* Counsel of Record

Of Counsel:

Rosemary Wummel Gardey

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
DC# CV-83-4381-WHO
Northern California
(San Francisco)

Filed September 5, 1995

THOMAS L. MAHALEK, individually and as the heir of Muriel Kole,

Plaintiff/Appellant,

—VS.—

KOREAN AIR LINES CO., LTD.,

Defendant/Appellee.

ORDER

Appellant's motion for voluntary dismissal of this appeal without prejudice to reinstatement upon disposition of the United States Supreme Court decision in *Zicherman v. Korean Air Lines*, 115 S. Ct. 1689, docketed April 17, 1995 is granted. The motion to reinstate must be filed within 28 days after the Supreme Court disposition.

A certified copy of this order sent to the district court shall act as and for the mandate of this court.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ WAYNE ANDERSON
Wayne Anderson
Deputy Clerk

BROWN, MONZIONE, FABBRO, ZAKARIA & SCARLETT
RICHARD E. BROWN, ESQUIRE (State Bar #104253)
900 Montgomery Street
San Francisco, CA 94133
Telephone: (415) 834-1111

Attorneys for Plaintiff
THOMAS L. MAHALEK

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
Filed August 9, 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Appellant,

—VS.—

KOREAN AIR LINES, CO., LTD., et al.

Respondent.

REQUEST FOR VOLUNTARY DISMISSAL

Appellant THOMAS L. MAHALEK hereby moves for a Voluntary Dismissal of the above-captioned appeal without prejudice to reinstate upon disposition of the United States Supreme Court Decision in *Zicherman v. Korean Air Lines*, 115 SC 1689, Docketed April 17, 1995.

Dated: August 8, 1995

BROWN, MONZIONE, FABBRO,
ZAKARIA & SCARLETT

By: RICHARD E. BROWN
RICHARD E. BROWN, ESQ.
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
DC# CV-83-4381-WHO
Northern California
(San Francisco)

Filed July 28, 1995

THOMAS L. MAHALEK, individually and as the heir of Muriel Kole,

Plaintiff/Appellant,

—VS.—

KOREAN AIR LINES CO., LTD.,

Defendant/Appellee.

ORDER

Movant is informed that an extension of time obtained by telephone is intended to be the sole extension of time to file that brief. Ninth Cir. R. 31-2.2(a).

The court is in receipt of appellant's late filed motion for an additional extension of time to file the opening brief. Appellant's motion is denied. However, within 14 days from the date of this order, appellant shall move for voluntary dis-

missal of his appeal without prejudice to reinstatement upon disposition of the U.S. Supreme Court case. Alternatively, appellant shall show cause, in writing, how he may be prejudiced by such a dismissal.

Failure to comply with this order in a timely fashion will subject this appeal to automatic dismissal pursuant to 9th Cir. R. 42-1.

Briefing shall be addressed, if appropriate, upon receipt of appellant's response.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

MARIO GISCOME
Mario Giscome
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-15559
DC# CV-83-04381-WHO

THOMAS L. MAHALEK, individually and as the heir of Muriel Kole,

Plaintiff-Appellant,

—v.—

KOREAN AIR LINES CO., LTD., a foreign corporation,

Defendant-Appellee.

TIME SCHEDULE ORDER

The parties shall meet the following time schedule:

-> Appellant/petitioner shall immediately file the civil appeals docketing statement (CADS), pursuant to Circuit Rule 33-1;

-> Appellant/petitioner shall notify appellee/respondent of transcripts to be ordered, pursuant to Circuit Rule 10-3.1(a); 4/6/95

-> Appellee/respondent shall notify appellant/petitioner of any additional transcripts needed, pursuant to Circuit Rule 10-3.1(b); 4/17/95

-> Appellant/petitioner shall file transcript order form with the district court and make payment arrangements with court reporter, pursuant to Circuit Rule 10-3.1; 4/26/95

-> Court reporter shall file transcript in the district court, pursuant to FRAP 11(b) and Circuit Rule 11-1.1; 5/30/95

-> Appellant/petitioner's opening brief, of no more than 35 pages, and excerpts of record shall be served and filed, pursuant to FRAP 31(a) and Circuit Rules 28-3.1 and 31-2; 7/13/95

-> The brief of appellee/respondent, of no more than 35 pages, shall be filed and served, pursuant to FRAP 31(a) and Circuit Rules 28-3.1 and 31-2; 8/14/95

-> The optional appellant/petitioner reply brief, of no more than 15 pages, shall be filed and served within fourteen days of service of the appellee/respondent's brief, pursuant to FRAP 31(a) and Circuit Rules 28-3.1 and 31-2.

FAILURE OF THE APPELLANT TO COMPLY WITH THE TIME SCHEDULE ORDER WILL RESULT IN AUTOMATIC DISMISSAL OF THE APPEAL. CIRCUIT RULE 42-1.

APPELLANTS/PETITIONERS WITHOUT REPRESENTATION OF COUNSEL IN A PRISONER APPEAL MAY HAVE THEIR CASE SUBMITTED ON THE BRIEFS AND RECORD WITHOUT ORAL ARGUMENT, PURSUANT TO FRAP 34(a)(3), CIRCUIT RULE 34-4. WITHIN 10 DAYS OF THE FILING OF THE APPELLANT'S OPENING BRIEF, PARTIES MAY FILE A STATEMENT SETTING FORTH THE REASONS WHY, IN THE OPINION OF THE PARTIES, ORAL ARGUMENT SHOULD BE HEARD.

FOR THE COURT:

Cathy A. Catterson
Clerk of Court

/s/ ED MANUEL
By: Ed Manuel
Deputy Clerk

BROWN, MONZIONE, FABBRO, ZAKARIA & SCARLETT
RICHARD E. BROWN, ESQUIRE (State Bar #104253)
900 Montgomery Street
San Francisco, CA 94133
Telephone: (415) 834-1111

Attorneys for Plaintiff
THOMAS L. MAHALEK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 83 4381 WHO
Filed March 24, 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—vs.—

KOREAN AIR LINES, CO., LTD., et al.

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that plaintiff THOMAS MAHALEK, in the above-referenced case appeals to the Court of Appeals, Ninth Circuit, from the Amended Judgment on Jury Verdict filed March 9, 1995, and the Order granting defendant Korean Air Lines' Motion for Judgment as a Matter of Law, filed March 9, 1995.

NOTICE IS FURTHER GIVEN THAT plaintiff requests the Clerk of the above-entitled Court to prepare a Clerk's transcript and designate all papers and records on file or lodged with the Court in the above-entitled action.

Dated: March 21, 1995

BROWN, MONZIONE, FABBRO,
ZAKARIA & SCARLETT

By: RICHARD E. BROWN
RICHARD E. BROWN, ESQ.
Attorney for Plaintiff
THOMAS MAHALEK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4381 WHO
Filed March 9, 1995

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—VS.—

KOREAN AIRLINES, CO., LTD.,

Defendant.

AMENDED JUDGMENT ON JURY VERDICT

This action having come on for trial before the Court and a jury, The Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, and defendant Korean Airlines Co., Ltd. having filed a motion for judgment as a matter of law and plaintiff Thomas Mahalek having filed a motion for prejudgment interest and costs,

IT IS ORDERED AND ADJUDGED that:

1. The Judgment on Jury Verdict filed on October 29, 1994, is VACATED.

2. Defendant Korean Airlines Co., Ltd.'s motion for judgment as a matter of law is GRANTED.

3. Plaintiff Thomas Mahalek's motion for prejudment interest and costs is DENIED.

Dated: March 7, 1995.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4381 WHO
Filed October 29, 1993

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—vs.—

KOREAN AIRLINES, CO., LTD.,

Defendant.

JUDGMENT ON JURY VERDICT

This action having come on for trial before the Court and a jury, The Honorable William H. Orrick, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that:

1. Plaintiff, Thomas L. Mahalek, suffered mental anguish and grief as a result of the death of Muriel Kole.

2. Plaintiff's mental anguish and grief did not result in actual mental injury accompanied by physical manifestations or aggravation of preexisting physical conditions that physically debilitated him with grief.

3. The amount of loss of love, affection and companionship that plaintiff has suffered (a) from September 1, 1983, to date of trial is $75,000; and (b) from date of trial forward is zero.

Dated: October 28, 1993.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK,
SENIOR JUDGE

No. C-83-4381 WHO

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—vs.—

KOREAN AIRLINES, CO., LTD.,

Defendant.

San Francisco, California
Monday, October 25, 1993
Tuesday, October 26, 1993

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff: BELLI, BELLI, BROWN, MONZIONE, FABBRO & ZAKARIA
900 Montgomery Street
San Francisco, California 94133

By: RICHARD E. BROWN, ESQ.

For Defendant: CONDON & FORSYTH
1900 Avenue of the Stars
Suite 650
Los Angeles, California 90067

By: STEPHEN R. GINGER, ESQ.
GEORGE N. TOMPKINS, III, ESQ.

MAHALEK-REDIRECT\BROWN

Q. (By MR. GINGER) Mr. Mahalek, did you sister name you as a beneficiary in her will?

A. No, not that I know of.

Q. Isn't it correct, Mr. Mahalek, that at the time of your sister's death that she was not providing you with any financial support?

A. She was not providing me with financial support. We both had independent careers.

Q. Would it also be correct that at the time of your sister's death that you had no expectation of receiving financial support from her in the future?

A. No, I had no expectation. There was no need for any such expectation.

MR. GINGER: Thank you, your honor. Nothing further.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-4049 WHO
Filed August 13, 1993

MICHAEL KOLE,

Plaintiff,

—VS.—

KOREAN AIRLINES,

Defendant.

No. C-83-4381 WHO

THOMAS L. MAHALEK, individually and as the heir of MURIEL KOLE,

Plaintiff,

—VS.—

KOREAN AIRLINES, CO., LTD., a corporation,

Defendant.

ORDER

Good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. The previous pretrial conference and trial dates are vacated.

2. Trial will commence in *Mahalek v. Korean Airlines*, No. C-83-4381 WHO, on October 25, 1993, at 8:30 a.m., and *Kole v. Korean Airlines*, No. C-83-4049 WHO will trail.

3. A pretrial conference will be held in both cases on October 14, 1993, at 2:00 p.m.

4. Defendant's motions for summary judgment and for determination of applicable damage law in *Kole v. Korean Airlines* are DENIED.

5. Defendant's motion for summary judgment in *Mahalek v. Korean Airlines* is DENIED.

Dated: August 12, 1993.

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ORRICK,
SENIOR JUDGE

No. C-83-4049 WHO

MICHAEL KOLE, individually, and as the heir of MURIEL KOLE, deceased, and all other 269 passengers and crew members,

Plaintiffs,

—vs.—

KOREAN AIRLINES (a foreign corporation) and
UNION OF SOVIET SOCIALIST REPUBLICS (a foreign nation)

Defendants.

San Francisco, California
Thursday, August 5, 1993

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff Kole: F. LEE BAILEY & AARON J. BRODER
350 Fifth Avenue—Suite 4710
New York, NY 10118

BY: KEVIN L. MOSLEY, ESQ.

For Plaintiff Mahalek:

BELLI, BELLI, BROWN, MONZIONE & FABBRO
574 Pacific Avenue
San Francisco, CA 94133

BY: RICHARD BROWN, ESQ.

For Defendant:

CONDON & FORSYTH
1251 Avenue of the Americas
New York, NY 10020

By: STEPHEN GINGER, ESQ.

* * *

THURSDAY, AUGUST 5, 1993

(TELEPHONE CONFERENCE CALL)

THE COURT: Hello. Gentlemen, will you please state your appearances.

MR. BROWN: Richard Brown, your honor, from Belli, Belli, Brown, Monzione & Fabbro, on behalf of the plaintiff, Thomas L. Mahalek, in Action Number C-83-4381.

MR. MOSLEY: Kevin Mosley from Bailey & Broder on behalf of the plaintiff, Michael Kole.

MR. GINGER: Good afternoon, your honor. Steven Ginger for Korean Air.

THE COURT: I have your memoranda, and I've decided on a good many of them before. So I'm simply going to give you my rulings.

In KAL's motion for summary judgment against Mahalek: First, he claims lack of standing under the DOHSA statute. I have already ruled on that December 23, 1992. And I ruled that Mrs. Mahalek had standing, despite the limitations of DOHSA, because the Warsaw Convention does not limit

recovery to the personal representative of the decedent, and it affirmatively provides for suit by persons other than passengers. That's at page 13 in my previous opinion. And that judgment collaterally estops KAL's motion for summary judgment in this case on the same grounds.

MR. BROWN: Your honor, that is also in accordance with Judge Motley's decision in 807 Fed.Supp. 1073 which arises out of the same facts.

THE COURT: And that analysis is equally applicable to Thomas Mahalek as it was to Michael Kole.

* * *

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.